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6 Attorneys for Plaintiff
7 NOODLE TIME, INC.

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 NOODLE TIME, INC., a Florida
12 corporation,

13 Plaintiff,

14 v.

15 BENIHIBACHI, a California
16 corporation.

17 Defendant.

Case No.

COMPLAINT FOR:

- (1) BREACH OF CONTRACT
(SETTLEMENT AGREEMENT);
(2) BREACH OF IMPLIED
COVENANT OF GOOD FAITH
AND FAIR DEALING; AND
(3) FRAUD IN THE INDUCEMENT**

DEMAND FOR JURY TRIAL

1 Plaintiff, NOODLE TIME, INC. (“Plaintiff” or “NT”), a Florida corporation,
2 by and through its undersigned counsel, files this complaint against Defendant
3 BENIHIBACHI, a California corporation (“Defendant” or “Benihibachi”). In
4 support of its claims, Plaintiff alleges, in on knowledge as to its own actions, and
5 otherwise upon information and belief, as follows:

6 **STATEMENT OF CASE**

7 1. This is a civil action by Plaintiff against Defendant seeking damages
8 sustained by Plaintiff, contractual damages, and costs and attorneys’ fees of this
9 action, among other relief, all arising from Defendant’s breach of the settlement
10 agreement dated May 1, 2021 between Plaintiff and Defendant
11 (“Settlement Agreement”) and attached hereto as Exhibit A.

12 **JURISDICTION AND VENUE**

13 2. This action arises under California common law.

14 3. This Court has jurisdiction over Plaintiff’s claims against Defendant
15 because Plaintiff and Defendant expressly agreed to submit to the jurisdiction of this
16 Court for any dispute arising out of the Settlement Agreement which resolved a case
17 in this District, in Section 18 of the Settlement Agreement.

18 4. This Court has personal jurisdiction over Defendant because Defendant
19 does business in the State of California and because the willful actions herein took
20 place in the State of California and this District.

21 5. Venue is proper in this District because Plaintiff and Defendant
22 expressly agreed, pursuant to Section 18 of the Settlement Agreement, which states
23 that “[a]ny dispute or controversy arising out of or relating to this Agreement shall be
24 commenced and heard only in United States District Court for the Central District of
25 California.”

26 6. Venue is also proper in this District pursuant to 28 U.S.C. § 1391(b) and
27 (c) because the facts giving rise to the claims alleged herein occurred in this judicial
28

1 district, and Defendant is a California corporation, with the capacity to be sued under
2 applicable law.

3 7. Plaintiff has engaged undersigned counsel and has agreed to pay
4 undersigned counsel reasonable attorneys' fees for all services rendered in this action
5 and otherwise in connection with enforcing Plaintiff's contractual rights, which are
6 concerning Plaintiff's underlying intellectual property rights.

7 THE PARTIES

8 8. Plaintiff NOODLE TIME, INC. is a Delaware corporation with a
9 business address of 21500 Biscayne Boulevard, Suite 900, Aventura, FL 33180.
10 Noodle Time is the owner and licensor of various registered trademarks (identified in
11 the Settlement Agreement, and attached hereto as Exhibit B) ("**BENIHANA®**
12 Trademarks") used in the United States, South America, Central America and the
13 Caribbean in connection with the franchising and operation of **BENIHANA®**
14 restaurants and restaurant services. Plaintiff, by and through its related companies
15 (hereinafter collectively "Plaintiff") does business in the State of California and has
16 licensed and/or franchised **BENIHANA®** restaurants located throughout California
17 namely in the cities of Anaheim, Burlingame, Carlsbad, Carson, Chino Hills,
18 Concord, Corona, Cupertino, Encino, Downey, Monterey, Ontario, Newport Beach,
19 Puente Hills, San Diego, San Francisco, Santa Anita, Santa Monica, Torrance, and
20 Tustin.

21 9. Upon information and belief, Defendant BENIHIBACHI ("Defendant")
22 is a California corporation with a principal address of 9901 Foothill Blvd., Sylmar,
23 CA 91342.

24 10. Upon information and belief, Defendant owns and/or operates,
25 individually and/or collectively, at least five (5) food truck locations offering take-out
26 restaurant and food catering services in Las Vegas, Nevada, and/or the following
27 locations in California: 6423 Hollywood Blvd, Hollywood, CA 90028; 950 S.
28 Figueroa Blvd, Los Angeles, CA 90015; 1776 Broadway, Oakland, CA 94612; 95 S.

1 Pine Avenue, Long Beach, CA 90802; 150 Ocean Blvd, Long Beach, CA 90802; 5473
 2 Mission Blvd, Riverside, CA 92509; and (individually and/or collectively, the
 3 “Food Trucks”).

4 FACTS COMMON TO ALL COUNTS

5 11. On November 20, 2020, Plaintiff filed a complaint in the United States
 6 District Court for the Central District of California against Defendant alleging
 7 trademark infringement, false designation of origin, California statutory unfair
 8 competition, trademark dilution, intentional interference with prospective economic
 9 relations, negligent interference with prospective economic relations, unfair
 10 competition, and other related claims (“Complaint”) with respect to Defendant’s
 11 unauthorized use of the of marks, names, and slogans BENIHIBACHI,
 12 BENIHIBACHI GRILL, BENIHIBACHILV, @benihibachi, @benihibachilv,
 13 www.benihibachi.com (individually and/or collectively “Defendant’s Marks”) in
 14 connection with the marketing, advertising, promotion, offering for sale, and/or sale
 15 of Defendant’s goods and services. The action was entitled *Noodle Time, Inc. v.*
 16 *Benihibachi*, Case No. 2:20-CV-10612 (the “Action”).

17
 18 12. The Complaint alleges, in summary, that Defendant owned and operated
 19 the Food Trucks offering take-out restaurant and catering services located in the State
 20 of California, and Defendant adopted and began using Defendant’s Marks in United
 21 States commerce since about October 2018 when Defendant opened its first Food
 22 Truck. Plaintiff alleged that Defendant’s Marks were confusingly similar to the
 23 **BENIHANA®** Marks, and that Defendant provided, marketed, advertising,
 24 promoted, offered for sale, and sold under Defendant’s Marks goods and services that
 25 were and are competitive to and with Plaintiff’s goods and services. Further,
 26 Defendant had at least been on constructive notice of Plaintiff’s **BENIHANA®**
 27 Marks due to the issuance by the United States Patent and Trademark Office of federal
 28

1 trademark registrations for the **BENIHANA®** Marks. Plaintiff provided examples of
 2 Defendant's use of Defendant's Marks and misuse of the BENIHANA® Marks.

3 13. On May 1, 2021, Plaintiff and Defendant entered into the Settlement
 4 Agreement to resolve the underlying dispute that was the subject of the Action.

5 14. Section 5 of the Settlement Agreement (Sections (i), (iv) and (v)) state,
 6 in part:

7 "5. No Further Use. Upon the Effective Date of this Agreement and
 8 thereafter, Benihibachi, its principals, officers, general partners, limited
 9 partners, shareholders, and owners, employees, agents, representatives,
 10 parents, affiliates, divisions, subsidiaries, successors, vendees, transferees,
 11 and/or assigns agrees to, individually and collectively on a worldwide basis,
 immediately and/or permanently refrain from, directly and indirectly (emphasis
 added):

12 (i) registering, attempting to register, using, renewing, maintaining,
 13 purchasing, or acquiring any rights in **any names, trademarks,**
 14 **trade dress, domain names, trade names, corporate names,**
 15 **fictitious names, consisting of, in whole or in part, the Alleged**
 16 **Infringing Marks**, the word BENI, the **BENIHANA®**
 17 Trademarks, or any other similar word or designation, alone or in
 18 combination with other words and/or design elements, any
 19 colorable imitations thereof, **and/or any names or source indicia**
 20 **confusingly similar thereto**, in connection with restaurant
 21 services and/or related goods/services; and...

22 (iv) using in any manner, advertising, promoting, selling or offering to
 23 sell, or authorizing others to do so, the Alleged Infringing Marks,
 24 the word BENI, the **BENIHANA®** Trademarks, any colorable
 25 imitations thereof, and /or any other words, phrases, trade dress,
 26 or symbols that are confusingly similar thereto in connection with
 27 the **BENIHANA®** Services or related goods and services; and...

28 (v) in connection with any food products, restaurant services and/ or
 related goods and services of any kind.... displaying and/or using
 in any manner, the Alleging Infringing Marks, the word BENI, the
BENIHANA® Trademarks, any colorable imitations thereof,
 and/or any other names confusingly similar thereto, alone and/or
 in combination with other words and/or design elements..."

1
2 15. Under the terms of the Settlement Agreement, Defendant is prohibited
3 from using certain marks in any manner, including the operation of its business, which
4 are defined as “Alleged Infringing Marks.” On information and belief, Defendant has
5 adopted and is wrongfully using one or more of the “Alleged Infringing Marks”
6 identified in the Settlement Agreement. For example, Defendant is using a Food
7 Truck with “BENIHIBACHI” emblazoned on the entire side of the vehicle, to identify
8 Defendant’s restaurant services. A photograph of this Food Truck, taken in
9 Los Angeles in February 2022 is attached hereto as Exhibit C. The Food Truck
10 advertises Defendant’s several Benihibachi locations: Hollywood, Fairfax,
11 Downtown, Long Beach, Oakland and San Jose. On information and belief,
12 Defendant operates multiple Food Trucks not only in California, but in multiple states,
13 including Nevada. Defendant’s Food Truck that is blatantly operating in Los Angeles
14 is just one instance of Defendant’s brash use and display of the Alleged Infringing
15 Marks in contravention of both the express terms, and the spirit and intent of the
16 Settlement Agreement.

17 16. In addition, on information and belief, Defendant is using at least one
18 mark, “BEHIBACHI,” which is confusingly similar to the prohibited mark,
19 “BENIHIBACHI,” in connection with its continued operation of the Food Trucks.

20 17. Defendant’s uses of BENIHIBACHI and BEHIBACHI are in breach of
21 Sections 5(i), 5(iv) and 5(v) of the Settlement Agreement, among others. The word
22 “BEHIBACHI” is confusingly similar to the word “BENIHIBACHI,” which
23 Defendant is clearly prohibited from using pursuant to the Settlement Agreement. In
24 fact, the term “BENIHIBACHI” still appears in search engine results and linking to
25 BEHIBACHI, which prevents Plaintiff from obtaining the benefits of the Settlement
26 Agreement.

27 18. Due to Defendant’s actions and breach of the Settlement Agreement, its
28 covenant of good faith and fair dealing, and commission of fraud in the inducement,

1 on or about January 3, 2022, counsel for Plaintiff sent a Notice of Settlement Non-
2 Compliance and Breach to counsel for Defendant in accordance with Section 13 of
3 the Settlement Agreement, detailing Defendant's breaches and offending actions.
4 Defendant did not cure its breaches or cease using the Alleged Infringing Marks,
5 causing Defendant's Material Breach under the Settlement Agreement, and
6 necessitating this action.

7 19. In addition to other relief, Section 13 of the Settlement Agreement
8 obligates Defendant to pay two thousand five hundred dollars (\$2,500) to Plaintiff,
9 plus prejudgment and post judgment interest, for each Material Breach, as liquidated
10 damages.

11 **COUNT 1: BREACH OF CONTRACT**

12

13 20. Plaintiff hereby repeats, realleges, and incorporates by reference, as
14 though fully set out herein, the allegations contained in Paragraphs 1 through 18
15 above.

16 21. The Settlement Agreement is a binding and enforceable contract between
17 Plaintiff and Defendant, which is attached hereto as Exhibit A.

18 22. Plaintiff performed all or substantially all of the actions that the
19 Settlement Agreement required Plaintiff to perform.

20 23. Defendant breached the Settlement Agreement by failing to refrain from
21 using the Alleged Infringing Marks (including, without limitation, BENIHIBACHI
22 and BEHIBACHI) on its Food Trucks, and in its Internet and social media listings,
23 among other things.

24 24. Defendant continues to breach the Settlement Agreement by refusing to
25 comply with the prohibitions set forth, including in Section 5 of the Settlement
26 Agreement, which obligates Defendant to cease using the Alleged Infringing Marks
27 and any mark similar thereto that may cause consumer confusion as to the owner of
28 the Food Truck, or the provider of the restaurant goods or services.

1 25. Defendant's breach of the Settlement Agreement is a substantial factor
2 in causing Plaintiff's harm. Defendant's conduct has damaged, and continues to
3 damage Plaintiff the extent that Defendant's (and/or its affiliates' or business
4 partners') goods and/ or services are offered improperly in connection with the
5 **BENIHANA®** Marks, and do not conform to Plaintiff's quality standards, such non-
6 conformity has injured or is likely to injure Plaintiff's reputation and goodwill.

7 26. As a result of Defendant's conduct and breach of the Settlement
8 Agreement, Plaintiff has been damaged in an amount to be determined at trial.

9 27. Plaintiff has been and will continue to be irreparably injured by
10 Defendant's conduct. Plaintiff cannot be adequately compensated for these injuries
11 by monetary remedies alone, and Plaintiff has no adequate remedy at law for
12 Defendant's material breach of the Settlement Agreement. Plaintiff is therefore
13 entitled to injunctive relief against Defendant, and, after trial, to recover any damages
14 proven to have been caused, or any profits of Defendant that have been earned
15 unjustly, by reason of Defendant's acts.

16
17 **COUNT 2: BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND**
18 **FAIR DEALING**

19 28. Plaintiff hereby repeats, realleges, and incorporates by reference, as
20 though fully set out herein, the allegations contained in paragraphs 1 through 26
21 above.

22 29. California law implies a covenant of good faith and fair dealing that
23 requires each party to the contract to not take actions that deprive the other party of
24 the benefits of the contract.

25 30. The Settlement Agreement is a binding and enforceable contract between
26 Plaintiff and Defendant, which contains an implied covenant that the parties will act
27 in good faith with respect to the performance of their contractual obligations, and will
28 not frustrate the other party's rights to the benefits of the contract at issue.

1 31. Defendant breached the implied covenant of good faith and fair dealing
2 in entering into and its performance of the Settlement Agreement by, among other
3 things, using the mark “BEHIBACHI.” Although the Settlement Agreement did not
4 expressly state that Defendant could not use the specific word “BEHIBACHI,”
5 Defendant’s use of this mark that is extremely similar to, and only two letters different
6 from “BENIHIBACHI,” is conduct that frustrates Plaintiff’s rights and benefits in the
7 Settlement Agreement.

8 32. By executing the Settlement Agreement and dismissing the Action
9 against Defendant, Plaintiff relied on various promises not only set forth in the
10 Settlement Agreement, but also on the implied covenant of good faith and fair dealing,
11 that Defendant would stop displaying or using any mark that had the same qualities
12 as Defendant’s marks that confused consumers, diluted the **BENIHANA®** Marks,
13 and caused damage, injury and harm to Plaintiff’s restaurant business.

14 33. Defendant’s conduct in using the mark BEHIBACHI continues to
15 confuse consumers who mistakenly believe that Defendant’s goods and services are
16 approved or endorsed by, or affiliated with Plaintiff, to Plaintiff’s injury and harm.
17 Because the Settlement Agreement cannot contemplate every permutation of every
18 Alleged Infringing Mark that Defendant agreed to stop using, Plaintiff relied on
19 Defendant’s implied covenant of good faith and fair dealing to ensure that Defendant
20 would not use any mark that is prohibited, or confusingly similar to a prohibited mark.
21 Defendant breached its implied covenant by, among other things, using the mark
22 “BEHIBACHI” to wrongfully continue to trade on the goodwill and reputation of
23 Plaintiff, to Plaintiff’s detriment.

24 34. As a result of Defendant’s conduct of continuing to use the Alleged
25 Infringing Marks and marks confusingly similar to the Alleged Infringing Marks,
26 Defendant breached its covenant of good faith and fair dealing implied in the
27 Settlement Agreement.
28

1 35. As a direct and proximate result of such breach, Plaintiff has been
2 damaged in an amount to be determined at trial.

3
4 **COUNT 3: FRAUD IN THE INDUCEMENT**

5 36. Plaintiff hereby repeats, realleges, and incorporates by reference, as
6 though fully set out herein, the allegations contained in paragraphs 1 through 34
7 above.

8 37. On information and belief, at the time Defendant executed the Settlement
9 Agreement, Defendant did not intend to honor its contractual promises when they
10 were made. Margarita Escobedo, the owner of Defendant, signed the Settlement
11 Agreement, and represented and warranted in the Settlement Agreement (Section 15)
12 that she was duly authorized to execute the Settlement Agreement on behalf of
13 Defendant, and to bind Defendant to the terms, conditions, provisions, duties and
14 obligations set forth in the Settlement Agreement.

15 38. Defendant's actions, including blatantly using one or more Food Trucks
16 prominently displaying the mark "BENIHIBACHI" in Los Angeles in February of
17 2022 (evidenced in Exhibit C), demonstrate that when entering into the Settlement
18 Agreement, Defendant had no present intent to perform on its promises that it would
19 stop using the Alleged Infringing Marks or any names or source indicia confusingly
20 similar thereto.

21 39. Defendant fraudulently induced Plaintiff to enter into the Settlement
22 Agreement and dismiss the Action by promising in the Settlement Agreement, among
23 other things, not to use the Alleged Infringing Marks, yet knowingly and intentionally
24 continued, and continues using the Alleged Infringing Marks in commerce to further
25 damage Plaintiff's business, confuse restaurant consumers, and cause Plaintiff to
26 suffer lost profits.

27 40. Further, Defendant's use of the Alleged Infringing Marks in connection
28 with the sale, offering for sale, distribution or advertising of its goods and services is

1 continuing to injure Plaintiff's business reputation, cause dilution of the distinctive
2 value of the **BENIHANA®** Marks, all to Plaintiff's irreparable harm.

3 41. Defendant made promises of future conduct (set forth in Section 5 of the
4 Settlement Agreement, "No Further Use") without any present intent to perform.

5 42. Defendant concealed and misrepresented to Plaintiff that Defendant had
6 no intention of complying with the Settlement Agreement and no intention of
7 discontinuing its use of the Alleged Infringing Marks in commerce.

8 43. Plaintiff reasonably relied on Defendant's promises and entered into the
9 Settlement Agreement, and performed the actions required by the Settlement
10 Agreement in good faith, including, without limitation, dismissing the Action against
11 Defendant.

12 44. As a direct and proximate result of Defendant's fraud in the inducement,
13 Plaintiff has been damaged in an amount to be determined at trial.

14
15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff Noodle Time, Inc. respectfully prays for the following
17 relief against Defendant:

18 (a) An order declaring that Defendant's continued unauthorized use of the
19 Alleged Infringing Marks and other wrongful conduct described herein
20 infringes Plaintiff's rights in the Settlement Agreement.

21 (b) An order prohibiting Defendant from continuing to engage in the unlawful,
22 unfair or fraudulent acts or practices alleged herein and requiring Defendant
23 to engage in a corrective advertising or informational campaign.

24 (c) An order permanently enjoining and restraining Defendant from continuing
25 to breach the Settlement Agreement.

26 (d) A judgment against Defendant which awards Plaintiff all profits received
27 by Defendant from its misuse of the **BENIHANA®** Marks and all profits
28 received by Defendant and all damages sustained by Plaintiff on account of

1 Defendant's false suggestion or connection with Plaintiff through the use of
2 the **BENIHANA®** Marks and/or the Alleged Infringing Marks.

3 (e) \$2,500 for each Material Breach committed by Defendant, plus
4 prejudgment and post judgment interest.

5 (f) All costs and disbursements in this action, pursuant to 15 U.S.C. §§ 1114
6 and 1117, California Code of Civil Procedure §1033.5. and any other
7 applicable law or statute; and

8 (g) Any other relief, including temporary restraining orders and preliminary
9 injunctions, that the Court finds warranted and just.

10
11 Respectfully submitted,

12
13 DATED: April 6, 2022

GARCIA RAINEY BLANK & BOWERBANK LLP

14
15
16 By

/s/ Jeffrey M. Blank

17
18 _____
19 JEFFREY M. BLANK
20 NORMA V. GARCIA
21 Attorneys for Plaintiff
22 Noodle Time, Inc.
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Pursuant to Fed.R.Civ.P.38(b) and Local Rule 38-1, Plaintiff hereby demands a trial by jury on all issues so triable in this action.

GARCIA RAINEY BLANK & BOWERBANK LLP

/s/ Jeffrey M. Blank

JEFFREY M. BLANK
NORMA V. GARCIA
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